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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO SIMON,

Defendant and Appellant.

G040601

(Super. Ct. No. 07CF1826)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W.

Michael Hayes, Judge. Affirmed.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Gerardo Simon of second degree robbery (Pen. Code, §§ 211, 212.5; all statutory references are to this code) and actively participating in a criminal street gang (§ 186.22, subd. (a)). The jury also found defendant committed the robbery “for the benefit of, at the direction of, or in association with any criminal street gang.” (§ 186.22, subd. (b)(1)(C).) Defendant challenges the sufficiency of the evidence to support the gang enhancement. For the reasons expressed below, we affirm.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of May 25, 2007, Richard Lucas was placing items in the trunk of his car after shopping at a home improvement store in Orange. Defendant, keeping one hand in the pocket of his baggy pants, approached Lucas and said, “Give me your wallet and there won’t be any trouble.” Lucas placed his wallet on the car because he feared defendant might have a weapon in his pocket. Defendant grabbed the wallet containing approximately \$150 in cash and some credit cards and then attempted to take a flashlight Lucas had purchased. A struggle ensued and defendant fled to the passenger side of a black Mitsubishi driven by Andy Flores.

Officers pursued the Mitsubishi to Santa Ana, where Flores pulled into a parking lot and stopped his car. Defendant jumped out of the car and fled. Officers apprehended Flores. Defendant discarded the victim’s wallet as he scaled a block wall and eluded one of the pursuing officers. Another officer joined the pursuit and arrested defendant at gunpoint.

Defendant spoke to Orange Police Officer John Mancini after his arrest. He admitted directing Flores to drive to the Orange store because he needed to “come up,” a gang term meaning to acquire money by committing a crime. Defendant confessed they robbed the victim, explaining he needed \$300 to pay his cell phone bill. He gave half the loot to Flores. He also admitted he was affiliated with Logan Street, a Santa Ana gang,

and that his gang moniker was “Baldy.” Mancini asked if he understood the crime was gang related because both he and Flores were documented members of the same gang, and defendant responded, “I guess, yeah.”

Mancini testifying as a gang expert, explained that defendant and Flores belonged to the same active Santa Ana criminal street gang at the time of the robbery and the gang’s primary criminal endeavors were illegal drug sales, theft, and robbery. Mancini had personally investigated several of the gang’s crimes and also acquired knowledge of the gang from consultations with Santa Ana police officers and his own investigative contacts with gang members.

Mancini opined that Flores and defendant were active participants in the Logan Street gang. Flores had previously been convicted for actively participating in the gang, admitted to Mancini he was a long-standing member of the gang and that his gang moniker was “Stoner.” Flores identified the gang’s turf and an intercepted letter Flores sent from jail confirmed his affiliation with the gang. Mancini noted defendant had received six STEP (Street Terrorism Enforcement and Prevention Act) notices since January 2003 and admitted he participated in the gang.

When presented with a hypothetical based on the facts of the robbery, Mancini concluded the crime was committed to promote, assist, and further the illegal goals of Logan Street because the offense was a violent act bolstering the reputation of the gang and the individual perpetrators.

The prosecution introduced evidence other gang members had been convicted of attempted murder (November 2002) and robbery (March 2002).

The jury convicted defendant of robbery, active gang participation, and found the gang enhancement to be true. The trial court imposed an aggregate sentence of 13 years and eight months comprised of the middle term of three years for robbery, a consecutive eight-month term for the substantive gang count, and a 10-year consecutive term for the gang enhancement.

## II

### DISCUSSION

#### A. *Substantial Evidence Supported the Jury's Finding Defendant's Gang Met the Definition of a Criminal Street Gang*

On appeal, defendant challenges the sufficiency of the evidence to support the gang enhancement. (§ 186.22, subd. (b)(1)(C).). He first contends the prosecution failed to show defendant's gang met the definition of a "criminal street gang" a group of three or more persons having as one of its primary activities the commission of one or more crimes listed in section 186.22, subdivision (e). (§ 186.22, subd. (f) [defining "criminal street gang"].)<sup>1</sup> We do not find the contention persuasive.

Our review of claims contesting the sufficiency of the evidence is limited. Where the record presents substantial evidence on which a reasonable trier of fact could find the defendant guilty, we may not disturb the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) The standard of review also applies to section 186.22 gang enhancements. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371.)

A "criminal street gang" is defined under the statute as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in [subdivision (e)], having a common name or common identifying sign or

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<sup>1</sup> In closing argument, counsel conceded defendant was guilty of robbery and actively participating in a criminal street gang. We nevertheless address defendant's claim there was insufficient evidence his gang was a criminal street gang within the meaning of the statute.

symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” (§ 186.22, subd. (f); *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*)). A “pattern of criminal gang activity” means the “commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the [listed offenses], provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons. . . .” (§ 186.22, subd. (e)). Subdivision (e) enumerates the offenses that count towards establishing whether a group is a criminal street gang. Robbery, drug sales, and vehicle thefts are included as offenses that may define a group as a criminal street gang.

The phrase “primary activities,” as used in the gang statute, implies the commission of one or more of the statutorily enumerated crimes is one of the group’s “chief” or “principal” occupations. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324.) The definition excludes the occasional commission of those crimes by the group’s members. Evidence of either past or present criminal acts listed in subdivision (e) of section 186.22 is admissible to establish the statutorily required primary activities of the alleged criminal street gang. (*Sengpadychith*, at p. 324.) “Sufficient proof of the gang’s primary activities might consist of evidence the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony . . . .” (*Ibid.*, original italics; see *People v. Gardeley* (1996) 14 Cal.4th 605, 620 [trial court properly admitted expert testimony that gang was primarily engaged in drug sales and witness intimidation when expert based opinion on conversations with defendant and fellow gang members, personal investigations of hundreds of crimes committed by gang members, and information from colleagues in his own police department and other law enforcement agencies].)

Mancini's expert testimony concerning the Logan Street gang provided substantial evidence the gang's primary activities consisted of illegal drug sales, vehicle thefts, and robberies. Mancini explained he had reviewed 14 "convictions" involving members of defendant's gang between 2000 and 2008. Six involved robberies, four involved vehicle thefts, and four involved illegal drug sales. Mancini also testified he had personally investigated several crimes involving the gang's members.

Defendant argues Mancini's opinion lacked adequate foundation because he failed to provide information concerning details of the other gang offenses, identities of the alleged gang members or how he determined the offenses were committed by the gang's members. He complains Mancini included the current incident in his list of "convictions" reviewed. He also asserts "Mancini knew very little about" the gang and suggests this was because Mancini was from Orange, not Santa Ana. He also faults Mancini because he could not provide names of the 20 or so persons currently active in the gang, or information concerning persons defendant associated with at the time of previous police contacts. Finally, he complains Mancini provided no details concerning the training or experience of other gang detectives he consulted.

Defendant relies on *Alexander L.*, *supra*, 149 Cal.App.4th 605. There, we reversed the juvenile court's true finding on a gang enhancement because the gang expert's testimony did not support the primary activities element. The expert had testified, "'I know they've [the gang] committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.'" (*Id.* at p. 611.) The expert did not explain how he knew about the offenses (*id.* at p. 612), and on cross-examination, he conceded the vast majority of cases relating to the gang involved graffiti, but failed to specify whether the incidents involved misdemeanor or felony vandalism. (*Ibid.*) We concluded the prosecution failed to establish the foundation for the expert's testimony, explaining it was "impossible to tell

whether [the officer's] claimed knowledge of the gang's activities might have been based on highly reliable sources, such as court records of convictions, or entirely unreliable hearsay.” (*Ibid.*) We also noted the officer never specifically testified the crimes he cited constituted the gang's primary activities, equivocated on direct examination and contradicted himself on cross-examination. (*Id.* at pp. 611-612; see *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1003; cf. *People v. Margarejo* (2008) 162 Cal.App.4th 102, 107 [distinguishing *Alexander L.*].)

Here, Mancini's testimony did not suffer from these deficiencies. He specifically testified as to the gang's primary activities, and based his opinion on personal knowledge of cases he investigated and convictions he personally reviewed. His years dealing with gangs, his personal investigations of the gang's crimes, his conversations with gang members and other gang experts, and his review of field identification cards and other reports sufficed to establish the requisite foundation for his testimony. (See *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427.)

Additionally, the prosecution introduced documentary evidence showing Logan Street gang members previously had committed the listed felonies establishing a pattern of criminal gang activity. Along with the facts of the current incident, sufficient evidence corroborated Mancini's opinions and supported the jury's conclusion defendant's group met the definition of a criminal street gang.

**B. *Substantial Evidence Supported the Jury's Finding Defendant Committed the Robbery in Association with a Gang or to Benefit the Gang***

Defendant argues there was insufficient evidence he intended to further the gang's felonious conduct when he robbed the victim. He argues defendant and Flores “were engaged in a frolic and detour unrelated to the gang because [defendant] needed money to pay his \$300 phone bill.” We disagree.

Section 186.22, subdivision (b)(1)(C), provides in relevant part, “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished . . . by an additional term of 10 years.”

To find true a gang enhancement allegation under section 186.22, subdivision (b), the trier of fact need not find defendant actively participated in a gang. Rather, the statute prohibits the commission of a felony “*for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . .*” (§ 186.22, subd. (b)(1)), italics added; see also *In re Ramon T.* (1997) 57 Cal.App.4th 201, 206-208.)

Where a defendant criminal street gang member commits a felony in association with a fellow gang member, he has committed the crime “in association” with the “criminal street gang” and the jury may infer an intent to assist criminal conduct by his fellow gang members. (*People v. Leon* (2008) 161 Cal.App.4th 149, 163.) Here, “the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members.” (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) As *Morales* explains, specific intent to benefit the gang is not required. “What is required is the ‘specific intent to promote, further, or assist in any criminal conduct by gang members. . . .’ Here, there was evidence that defendant intended to commit robberies, that he intended to commit them in association with [others], and that he knew [the others] were members of his gang. . . . It was fairly inferable that he intended to assist criminal conduct by his fellow gang



members.” (*Ibid.*) Like the facts in *Morales*, substantial evidence supported the conclusion defendant and his gang cohort Flores acted in tandem to rob the victim.

In his reply brief, defendant relies on federal authority holding the specific intent element of section 186.22, subdivision (b), is not satisfied by evidence the defendant has the intent to assist a fellow gang member in any criminal conduct; rather the specific intent must be to facilitate *other* criminal activities by gang members. (See *Briceno v. Scribner* (9th Cir.2009) 555 F.3d 1069, 1079, fn. 3; *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1103.) As lower federal court decisions, these cases are not binding on this court. (*People v. Burnett* (2003) 110 Cal.App.4th 868, 882.) We agree with our Court of Appeal colleagues these cases misinterpret section 186.22. (*People v. Hill* (2006) 142 Cal.App.4th 770, 774; *People v. Romero* (2006) 140 Cal.App.4th 15, 20; cf. *Briceno*, at pp. 1084-1089 (conc. & dis. opn. of Wardlaw, J.).)

Additionally, Mancini’s testimony established that defendant robbed the victim for the benefit of his gang. In response to a hypothetical based on the facts of the robbery, Mancini opined the crime was committed to promote, further or assist criminal conduct by gang members. Being a violent act, the robbery enhanced defendant’s status within his gang, and bolstered the gang’s reputation for violence in the local community. This, in turn, would serve to intimidate those in the community who would resist the gang’s criminal endeavors and ward off potential rivals from encroaching on their turf. We therefore conclude substantial evidence supports the jury’s finding on the gang enhancement.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, ACTING P. J.

IKOLA, J.